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POWER OF THE GOVERNMENT OF THE UNITED STATES TO OWN AND OPERATE RAILROADS, ETC.*

The excerpts from the opinions of United States judges given in the following pages clearly show that there is no constitutional objection to government ownership of railways that lead from one state to another. There might possibly be some objection if the railroad was located entirely within state lines, but even this is doubtful, if the road was used as a mail line, or carried interstate articles of commerce.

The National Bank case¹ clearly establishes the right of Congress to create a corporation, a right which although invoked early after the adoption of the constitution, remained questioned until this decision. This opinion is also important in showing the liberal construction that is to be given to the constitution as to the implied powers existing. If Congress could create a corporation with powers to do certain things, the conclusion is irresistible that it could pass laws for the government *itself* to do the same things.

Under the power to regulate commerce it has authorized the construction of railroads,² highways,³ bridges, etc. That, if necessary, it could condemn them seems to be upheld under the power of eminent domain, as illustrated in the matter of post-office sites,⁴ highways,⁵ forts, lighthouses, roads, etc.,⁶ and memorial cemeteries.⁷ The latter is certainly a very liberal construction of the implied powers existing in Congress. While the State might pass laws affecting railroads, under the police power of the State, yet if such laws in any way placed an unreasonable restriction upon the use of the railroad, they would be held in-

*This article appeared in the Central Law Journal, March 3, 1916.

1. See *infra*, 1 a.

2. See *infra*, 2 e.

3. See *infra*, 2 f.

4. See *infra*, 3 f.

5. See *infra*, 3 g.

6. See *infra*, 3 h.

7. See *infra*, 3 i.

valid,⁸ and the laws of Congress would prevail.⁹ That there might be government ownership is clearly inferred by the court¹⁰ and that the U. S. Courts would fully protect such roads is distinctly decided.¹¹

The power of eminent domain being supreme, a compulsory taking over of the roads would not be objectionable as impairing the obligation of contracts. The latter is a restriction on State power and does not apply to acts of Congress.¹²

1. *May Create Corporation.*—a. General Discussion of Implied Powers. The Government of the United States then, though limited in its powers, is supreme, and its laws, when made in pursuance of the constitution, form the supreme law of the land.

Among the enumerated powers, we do not find that of establishing a bank or a corporation. But there is no phrase in the instrument which, like the article of confederation, excludes incidental and implied powers, and which requires that everything granted shall be expressly and minutely described. A constitution to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution would partake of the prolixity of a legal code and could scarcely be embraced by the human mind. Although among the enumerated powers of government we do not find the word Bank or Incorporation, we find the great powers to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct a war; and to raise and support armies and navies.

The sword and the purse, all the external relations, and no inconsiderable portion of the industry of the nation are entrusted to its government. It can never be pretended that these vast powers draw after them others of inferior importance merely because they are inferior. Such an idea can never be advanced. But it may, with great reason, be contended that a government, intrusted with such ample powers, on the due execution of which the happiness and prosperity of a nation depends, must also be intrusted with ample means for its execution.

8. See *infra*, 4 a.

10. See *infra*, 5 a.

12. 8 Cyc. 930.

9. See *infra*, 4 c.

11. See *infra*, 5 b.

The exigencies of the nation may require that treasure raised in the North should be transported to the South; that raised in the East conveyed to the West, or that this order should be reversed.**

The government which has a right to do an act, and has imposed on it the duty of performing that act, must, according to the dictates of reason, be allowed to select the means; and those who contend that it may not select any appropriate means, that one particular mode of affecting the object is excepted, take upon themselves the burden of establishing that exception.*** The several powers of Congress may exist, in a very imperfect state, to be sure, but they may exist and be carried into execution, although no punishment should be inflicted in cases where no punishment is not expressly given. Take for example, "the power to establish post offices and post roads." This power is exercised by the single act of making the establishment. But from this has been inferred the power and duty of carrying mail along the post road, from one post office to another. And from this implied power, has again been inferred the right to punish those who steal letters from the post office, or rob the mail.

We admit as all must admit, that the powers of the government are limited and that its limits are not to be transcended. But we think the sound construction of the constitution must allow to the national legislature that discretion with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in a manner most beneficial to the people.

But where the law is not prohibited and is really calculated to effect any of the objects entrusted to the government, to undertake here to inquire into the degree of its necessity would be to pass the line which circumscribes the judicial department, and to tread on legislative ground.¹³

This was the great National or Central Bank case, in which it distinctly held that the government could create a corporation.

2. *Regulate Commerce*—a. *Definition*. Definitions as to what constitutes interstate commerce are not easily given as to clearly define the full meaning of the term. We know from the cases de-

13. *McCullough v. Maryland*, 17 U. S. 429.

cided in this court that it is a term of very large significance. It comprehends, as it is said, intercourse for the purpose of trade in any and all its forms, including transportation, purchase, sale and exchange of commodities between citizens of different states, and the power to regulate it embraces all the instruments by which commerce may be conducted.¹⁴

b. *Same on Land as Water.* Congress has the same power to regulate commerce upon land as upon water. A river, to be sure, is a natural channel; but if it is not navigable, it can no more be used for the purpose of commerce than the land, and, therefore, to convict it from the mere natural channel into a public highway, for commercial purposes, and to levy a toll to reimburse the expense, no more conflicts with the powers of Congress over the commerce of the country, than to the construction of a channel or a turnpike for the same purposes and with the same tolls.¹⁵

In this case it was sought to condemn a lock and dam, the property of the defendant, a corporation created under the laws of Pennsylvania.

c. *Rivers Not Questioned.* The power of Congress to pass laws for the regulation of the navigation of public rivers, and to prevent any and all obstructions therein is not questioned.¹⁶

d. *Construction of Bridges.* The paramount power of regulating bridges that affect the navigation of the navigable waters of the United States is in Congress. It comes from the power to regulate commerce with foreign nations and among the States.¹⁷

dd. *May Be Exercised in State.* A bridge over an interstate waterway, although erected under the sanction of a state, and although not an illegal structure or an unreasonable obstruction to navigation in the condition of commerce and navigation at the date of the erection, must be taken as having been constructed

14. *Hopkins v. U. S.*, 171 U. S. 578, 43 L. Ed. 290. *Welton v. Missouri*, 91 U. S. 275 (23, 347). *County, etc. v. Kimball*, 102 U. S. 691 (26, 238). *Gloucester, etc. v. Penn.*, 114 U. S. 196 (29, 158). *Hooper v. Cal.*, 155 U. S. 648 (39, 300). *U. S. v. Knight Co.*, 150 U. S. 1 (39, 325).

15. *Monongahela Na. Co. v. U. S.*, 148 U. S. 334 (37, 471).

16. *Williamette, etc. v. Hatch*, 125 U. S. 1.

17. *Newport, etc. v. U. S.*, 105 U. S. 470, 26 L. Ed. 1143.

with knowledge of the paramount power of Congress to regulate commerce among states, and subject to the condition or possibility that Congress might, at some time after its construction, and for the protection and benefit of the public, exert its constitutional power to protect free navigation, as it then was against unreasonable obstructions.¹⁸

e. *May Construct Railroads.* Congress has authority, in the exercise of its power, to regulate commerce among the several states, to construct, or authorize the individual or corporation to construct, railroads across the states and territories of the United States.¹⁹

f. *May Construct Highways.* The power to construct, or to authorize individuals or corporations to construct, national highways and bridges from state to state is essential to the complete control and regulation of interstate commerce. Without authority in Congress to establish and maintain such highways and bridges, it would be without authority to regulate one of the most important adjuncts of commerce. This power in former times was exerted to a very limited extent, the Cumberland or National road being the most notable instance. Its exertion was but little called for, as commerce was then mostly conducted by water and many of our statesmen entertained doubts as to the existence of the power to establish a way of communication by land. But since, in consequence of the expansion of the country, the multiplication of its products and the invention of railroads and locomotives by steam, land transportation has so vastly increased, a sounder consideration of the subject has prevailed, and has led to the conclusion that Congress has plenary power over the whole subject. Of course, the authority of Congress over the territories of the United States, and its power to grant franchises exercisable therein, are, and ever have been, undoubted.

But the wider power was very freely exercised, and much to the general satisfaction, in the creation of the vast system of railroads connecting the East and the Pacific, traversing states as

18. *Monongahela Bridge Co. v. U. S.*, 216 U. S. 177, 50 L. Ed. 435.

19. *California v. Cent. Pac. R. R.*, 127 U. S. 1, 32 L. Ed. 151.

well as territories, and employing the agency of the states as well as Federal corporations.²⁰

When Congress acts with reference to a matter confided to it by the Constitution, then its statutes displace all conflicting local regulations touching that matter, although such regulations may have been established in pursuance of a power not surrendered by the states to the general government.²¹

3. *Eminent Domain*.—a. *Attribute of Sovereignty*. Without doubt, Congress, representing as it does, in the house of representatives the sovereignty of the people, and in the senate the sovereignty of the state, can, whenever it deems necessary, order private property to be appropriated for the public use. Such order would be subject to the constitutional limitation and would require that compensation be made for such appropriation.²²

b. *Constitutional Limitations*. And so it has been determined that the clause in the federal Constitution providing that private property shall not be taken for a public use without just compensation is no part of the right itself, but only a limitation of the right. In other words, the right of eminent domain is as supreme now, in its initial operation, as it was before the amendment was adopted.²³

c. *Does Not Depend on Constitutional Recognition*. Eminent domain is the supreme dominion the sovereign power has in and over all the property within its jurisdiction, coupled with the absolute right to appropriate such property, against the owner, for the promotion of the general welfare, or as public necessity may require. It pertains as a necessary, constant and inexhaustible attribute to sovereignty, and therefore does not depend upon constitutional recognition or legislative enactment.²⁴

d. *May Be Exercised in States*. The right of eminent domain exists in the Federal Government, and may be exercised within the states so far as may be necessary to the enjoyment of the powers conferred upon it by the Constitution.²⁵

20. *California v. Cent. Pac. R. R.*, 127 U. S. 1, 32 L. Ed. 157.

21. *Gibbons v. Ogden*, 9 Wheat, 1, 211, 6 L. Ed. 23.

22. *In re Rugheimer*, 36 Fed. 369.

23. *In re Montgomery*, 48 Fed. 900.

24. *In re Montgomery*, 48 Fed. 900.

25. *Kohl v. U. S.*, 91 U. S. 367.

e. *Offspring of Political Necessity.* The right is the offspring of political necessity and it is inseparable from sovereignty, unless denied to it by its fundamental law.²⁶

When the power to establish post office and create courts was conferred upon the Federal Government, included in it was authority to obtain sites for such offices and for courts, and to obtain them by such means as were known and appropriate.

f. *Post Office Sites.* For eighty years after the foundation of the government no act of Congress was ever passed for the exercise of this power.²⁷

This was a case for condemnation of site for Government building in Cincinnati in 1872.

g. *Highways.* In authorizing the condemnation of lands for a highway, the United States only claim to exercise the power which belongs to every sovereign to appropriate private property to a public use.²⁸

h. *Forts, Light-houses, Roads, etc.* So far, however, as it may be necessary to appropriate lands or other property for its own purposes, as for forts, lighthouses, military posts, or roads and the like, the general government still may exercise the right within the states, and for the same reasons on which the right rests in any case, viz.: the absolute necessity that the means used by the government for performing its functions and perpetuating its existence, should not be subject to be controlled or defeated by the want of consent of private parties or any other authority.²⁹

i. *Memorial Cemeteries.* The preservation of the battlefield of Gettysburg, with the leading tactical positions properly marked with tablets, is a use which comes within the constitutional power of Congress to provide for by the condemnation of land.³⁰

j. *No Narrow View.* The right to condemn at all is not given.

26. *Kohn v. U. S.*, 91 U. S. 367.

27. Brief—Stallo & Kittridge. *Kohl v. U. S.*, 91 U. S. 367.

28. *Chesapeake Canal Co. v. Union Bank*, 5 Fed. Cases, No. 2653. Canal in 1830.

29. *Cooley Const. Limitations* 525, quoted in *U. S. v. Inlots*, 26 Fed. Cases, No. 15441.

30. *U. S. v. Gettysburg Electric Ry. Co.*, 160 U. S. 668.

It results from the implied powers that are given, and it is implied because of its necessity, or because it is appropriate in exercising those powers. Congress has power to declare war and to equip armies and navies. It has the great power of taxation to be exercised for the common defense and general welfare. Having such powers, it has such other and implied ones as are necessary and appropriate for the purpose of carrying the powers expressly given into effect. Any act of Congress which plainly and directly tends to enhance the respect and love of the citizen for the institutions of his country and to quicken and strengthen his motives to defend them, and which is germane to and intimately connected with and appropriate to the exercise of some one or all of the valid powers granted by Congress must be valid. * * *

No narrow view of the character of this proposed use should be taken. Its national character and importance we think are plain. The power to condemn for this purpose need not be plainly and unmistakably deduced from any one of the particularly specified powers. Any number of these powers may be grouped together, and an inference from all may be drawn that the power claimed has been conferred.³¹

k. *In Discretion of Congress.* It is stated in the 2nd Vol. of Judge Dillon's work on Municipal Corporations,³² that when the legislature has declared the use or purpose to be a public one, its judgment will be respected by the courts unless the use is palpably without reasonable foundation.³³

4. *State Police Power.* a.— *Cannot Invade Power of Congress.* But whatever may be the nature and reach of the police power of a state, it cannot be exercised over a subject confided exclusively to Congress by the federal Constitution. It cannot invade the domain of the national government. * * * It may not under the cover of exerting its police powers, substantially prohibit or burden either foreign or interstate commerce.³⁴

In this case it was held "since the range of a state's police power comes very near the field committed by the Constitution

31. U. S. v. Gettysburg Electric Ry. Co., 160 U. S. 668. Gettysburg Cemetery.

32. 4th Ed., Sec. 600.

33. 4th Ed., Sec. 600. Gettysburg Cemetery.

34. Hannibal, etc. v. Huson, 95 U. S. 471, 24 L. Ed. 5271.

to Congress, it is the duty of courts to guard vigilantly against any needless intrusion."

b. *Definition.* Definition of the police power, must be taken, subject to the condition that the state cannot in its exercise, for any purpose whatever, encroach upon the powers of the general government, or rights granted or secured by the supreme law of the land.³⁵

c. *Where Doubt, Congress Prevails.* For, while it may be a police power in the sense that all provisions for the health, comfort, and security of the citizens are police regulations, and an exercise of the police power, it has been said more than once in this court that, even where such powers are so exercised as to come within the domain of Federal authority as defined by the Constitution, the latter must prevail.³⁶

Here it was held that state might pass quarantine regulations, etc.

e. *Instances Where State Prevails.* Few classes of cases have become more common of recent years than those wherein the police power of the state over the vehicles of interstate commerce has been drawn in question. That such power exists and will be enforced, notwithstanding the constitutional authority of Congress to regulate such commerce, is evident from the large number of cases in which we have sustained the validity of local laws designed to secure the safety and comfort of passengers, employees, persons crossing railway tracks, and adjacent property owners, as well as other regulations intended for the public good.

We have recently applied this doctrine to state laws requiring locomotive engineers to be examined and licensed by state authorities,³⁷ requiring such engineers to be examined from time to time with respect to their ability to distinguish colors.³⁸ Requiring telegraph companies to receive dispatches and transmit and deliver them with due diligence.³⁹ Forbidding the running

35. *New Orleans, etc. v. Louisiana*, 115 U. S. 661. 29 L. Ed. 521.

36. *Morgan, etc. v. Louisiana, etc.*, 118 U. S. 464. 30 L. Ed. 241.

37. *Smith v. Ala.*, 124 U. S. 465. 31 L. Ed. 508.

38. *Nashville Ry. v. Ala.*, 128 U. S. 96. 32 L. Ed. 352.

39. *Western Union, etc. v. James*, 162 U. S. 650. 40 L. Ed. 1115.

of freight trains on Sunday.⁴⁰ Requiring railway companies to fix their rates annually for the transportation of freight and passengers, and also requiring them to post a printed copy of such rates at their stations.⁴¹ Forbidding the consolidation of parallel or competing lines of railway.⁴² Regulating the heating of passenger cars, directing guards and guard posts to be placed on railway bridges and trestles and approaches thereto.⁴³ Providing that no contract shall exempt any railroad corporation from the liability of a common carrier or carrier of passengers, which would have existed if no contract had been made.⁴⁴

In none of these cases was it thought that the regulations were unreasonable or operated in any just sense as a restriction upon interstate commerce.⁴⁵

In this case it was held that the Illinois statute which required all passenger trains to stop at county seats was invalid.

The statute of Ohio which required that three passenger trains should stop at every station containing three thousand population, was approved.⁴⁶

5. *General Matters.* a. *Government Ownership.* Of course, the question will be asked, and pertinently asked, has the public no remedy against exorbitant fares and freights exacted by state lines of transportation?

We cannot entirely shut our eyes to the argument *ab inconvenienti*. But it may be also asked: Has the public any remedy against exorbitant fares and freight exacted by steamship lines at sea? Maritime transportation is almost exclusively monopolized by them as land transportation is by the railroads. In their case the only relief is found in the existence or fear of competition. The same kind of relief should avail in reference to land transportations, whether in addition to this, Congress under the power to establish post roads, to regulate commerce with foreign nations, and among the several states, and to provide a common

40. *Hennington v. Ga.*, 163 U. S. 299. 41 L. Ed. 166.

41. *Chicago, etc. v. Fuller*, 17 Wall. 560. 21 L. Ed. 710.

42. *Louisville, etc. v. Ky.*, 161 U. S. 677. 4 L. Ed. 849.

43. *New York, etc. v. New York*, 165 U. S. 628. 41 L. Ed. 853.

44. *Chicago, etc. v. Solan*, 169 U. S. 133. 42 L. Ed. 688.

45. *Cleveland Ry. v. Illinois, etc.*, 177 U. S. 524, 868.

46. *B. & O. Ry. v. Maryland*, 88 U. S. 479.

defense and general welfare, has authority to establish and facilitate the means of communication between the different parts of the country, and thus counteract the apprehended impediments referred to is a question which has exercised the profoundest minds of the country.

This power was formerly exercised on the construction of the Cumberland road and other similar works. It has more recently been exercised, though mostly on national territory, in the establishment of railroad communication with the Pacific Coast. But it is to be hoped that no occasion will ever arise to call for any general exercise of such power, if it exists.

It can hardly be supposed that individual states as far as they have reserved, or as still possess the power to interfere, will be so regardless, of their own interests as to allow an obstruction policy to prevail. If, however, state institutions should so combine or become so consolidated and powerful as, under cover of irrevocable franchise already granted, to acquire absolute control over the transportation of the country and should exercise it injuriously to the public interest, every constitutional power of Congress would undoubtedly be invoked for relief. Some of the states are so situated as to put it in their power, or that of their transportation lines, to interfere formidable obstacles to the free movement of commerce of the country.

Should any such system of exactions be established in the states as to materially impede the passage of produce, merchandise or travel, from one port of the country to another? It is hard to be supposed that the case is a *causus omissus* in the constitution, commercially this is but one country, and intercourse between all its parts should be as free as due compensation to the carrier will allow. This is demanded by the "general welfare" and is dictated by the spirit of the constitution at least. Any local interference with it will demand all the just powers with which it is clothed.⁴⁷

In this case it was held that a state might regulate fares, etc., but "a state cannot impose a tax on movement of persons or property from one state to another."

b. *Summing up Powers.* Summing up our conclusions we hold that the Government of the United States is one having juris-

47. B. & O. Ry. v. Md., 88 U. S. 479. 22 L. Ed. 689.

diction over every foot of rail within its territory, and acting directly upon each citizen: that while it is a government of enumerated powers, it has within the limits of those powers all the attributes of sovereignty; that to it is committed power over interstate commerce and transmission of the mail; that the powers thus conferred upon the national government are not dormant, but have been assumed, and having put into practical exercise of those powers it is competent for the nation to remove all obstructions upon highways, natural or artificial, to the passage of interstate commerce or the carrying of the mail. * * *

It is said that the jurisdiction heretofore exercised by the national government over highways has been in respect to waterways, the national highways of the country, and not over artificial highways such as railroad, * * * but the basis upon which rests its jurisdiction over artificial highways is the same as that which supports it over the natural highways.⁴⁸

In this case it was held "The same fullness of control exists in the government over artificial highways as instruments of commerce as our waterways, and the same power to remove obstructions one with another, and a court of equity has power to interfere by injunction in cases of public nuisances" and the obstruction of a highway is a public nuisance.

Debs and others were charged with conspiracy, etc., and boycott against the Pullman Car Co.

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Springfield, O.

48. In re Debs., 158 U. S. 589. 39 L. Ed. 1092.